Supreme Court, U. S.
FILED
JUN 7 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

VS.

ALLAN BAKKE,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF MINORITY CONTRACTORS AND MINORITY CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, INC. IN SUPPORT OF PETITIONER

STEPHEN V. BOMSE
DANIEL E. TITELBAUM
44 Montgomery Street
San Francisco, California 94104
Attorneys for Amici

THOMAS J. BREWER
HENRY L. HECHT
HELLER, EHRMAN, WHITE & MCAULIFFE
44 Montgomery Street
San Francisco, California 94104
Of Counsel

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Judiciary and the Equal Protection Clause: A General Perspective ...	6
II. Race and the Equal Protection Clause	8
III. Affirmative Action Admissions Programs ...	13
A. Goals	14
B. Means	19
C. Allan Bakke	24
CONCLUSION	28

TABLE OF AUTHORITIES

Cases	Page
Associated General Contractors of Mass. v. Altshuler, 490 F. 2d 9 (1st Cir. 1973)	1
Associated General Contractors v. San Francisco Unified School District, C-76-2244 (N.D. Cal.)	1
Bakke v. Regents of the University of California, 18 Cal. 3d 34 (1976)	19,21, 24,25, 26
Bolling v. Sharpe, 347 U.S. 497 (1954)	11
Craig v. Boren, 45 U.S.L.W. 4057 (1976)	7
Dunn v. Blumstein, 405 U.S. 330 (1972)	15
Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955)	16
Green v. County School Board, 391 U.S. 430 (1968)	25
Griffin v. County School Board, 377 U.S. 218 (1964)	19

TABLE OF AUTHORITIES
(Continued)

Cases	Page
Ishimatsu v. Regents of the University of California, 72 Cal. Rptr. 756 (1968)	23
Jefferson v. Hackney, 406 U.S. 535 (1972)	7
Lane v. Wilson, 307 U.S. 268 (1939)	19
Loving v. Virginia, 388 U.S. 1 (1967)	11
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)	26
McLaughlin v. Florida, 379 U.S. 184 (1964)	11
Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940)	22
Nixon v. Herndon, 273 U.S. 536 (1927)	8
Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928)	26
Railway Express Agency v. New York, 336 U.S. 106 (1949)	14

TABLE OF AUTHORITIES
(Continued)

Cases	Page
Reed v. Reed, 404 U.S. 71 (1971)	8
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	7,11
Shapiro v. Thompson, 394 U.S. 618 (1969)	8
Simmons v. United States, 406 F.2d 456 (5th Cir. 1969)	6
Strauder v. West Virginia, 100 U.S. 303 (1880)	8
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)	10
Terry v. Adams, 345 U.S. 461 (1953)	19
The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)	8
Tigner v. Texas, 310 U.S. 141 (1940)	6
United Jewish Organizations of Williamsburgh, Inc. v. Carey, 45 U.S.L.W. 4221 (1977)	3,10,11, 13,16,18, 24,25

Cases — Page

United States v. Carolene Products Co., 304 U.S. 144 (1938) 11

Uphaus v. Wyman, 360 U.S. 72 (1959) 22

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 45 U.S.L.W. 4073 (1977) 3,16

Wall v. Board of Regents, 102 P.2d 533 (1940) 23

Washington v. Davis, 426 U.S. 229 (1976) 3,16

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) 14

Constitutions, Statutes and Rules

California Constitution, Art. IX, §9 23

Executive Order 11246, 32 Fed. Reg. 12319, as amended, at 32 Fed. Reg. 14303 & 34 Fed. Reg. 12985 12

Page

United States Constitution, Fourteenth Amendment .. passim

42 U.S.C. §4321 et seq. .. 22

Texts

Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955) 10

Brest, Foreword: In Defense of the Anti-Discrimination Principle, 90 Harv. L. Rev. 1 (1976) 5,12,20

Curtis, A Modern Supreme Court in a Modern World, 4 Vand. L. Rev. 427 (1951) 7

Developments in the Law -- Equal Protection, 82 Harv. L. Rev. 1065 (1969) 4,12,15

Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723 (1974) 4,23

Karst & Horowitz, Affirmative Action and Equal Protection, 60 Va. L. Rev. 975 (1974) 4

Page

Nagel, Equal Treatment and Compensatory Discrimination, 2 Phil. & Pub. Affs. 348 (1973) 4

O'Neil, Racial Preference and Higher Education: The Larger Context, 60 Va. L. Rev. 925 (1974) 4

Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1 4,9

Redisch, Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments, 22 U.C.L.A.L. Rev. 343 (1974) 4

Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653 (1975) 4,9,10

Tussman and ten Broek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341 (1949) 6

Page

Von Neumann & Morgenstern, Theory of Games and Economic Behavior (Princeton, 1953) 17

Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959) 22

INTEREST OF AMICI CURIAE

This brief amicus curiae is filed pursuant to written consent of all parties on behalf of the National Association of Minority Contractors and the Minority Contractors Association of Northern California, Inc.

Amici are associations of black contractors and subcontractors in California and elsewhere. A principal purpose of the associations is to seek opportunities for their members within the construction industry, which historically has been virtually closed to non-whites. Cf. Associated General Contractors of Mass. v. Altshuler, 490 F.2d 9 (1st Cir. 1973). Amici have obtained affirmative action commitments from various public entities requiring special efforts to increase the utilization of minority subcontractors on construction projects let pursuant to their respective authority. Several of these affirmative action programs have been challenged by non-minority contractors as a violation, inter alia, of the fourteenth amendment. E.g., Associated General Contractors v. San Francisco Unified School District, C-76-2244 (N.D. Cal.).

Amici are concerned that affirmance of the decision below may impair these existing programs as well as their ability to obtain similar affirmative action commitments in the future. Amici also believe that the points presented herein are not merely cumulative of the views of the parties or of other amici filing briefs in support of petitioner, and that consideration of this brief may therefore benefit the Court.

SUMMARY OF ARGUMENT

This brief does not argue for or against the wisdom of petitioner's minority admissions program. It argues only that the program is a constitutionally permissible exercise of non-judicial, governmental authority.

We take as our first principle that the role of the federal courts is properly a limited one, and that it reserves to the non-judicial branches the task of establishing society's goals and allocating its scarce public resources. It is only when these branches overstep constitutional limits that this or any other court is empowered to intervene.

Thus viewed, petitioner's program should be upheld, for neither its goals nor the means selected to pursue those goals are constitutionally intolerable. The basis for traditional hostility towards racial classifications is that race generally serves no function as a sorting criterion and may, in fact, betoken an intent to oppress particular racial minorities. But petitioner's program possesses neither of these

vices. Its intended function is, simply, to increase opportunities for racial minorities and to overcome, in part, their historic underrepresentation in the medical profession. The means selected are not merely consistent with, but are precisely tailored to, that end. Thus, while reasonable people may disagree as to the desirability of such a program, we submit that it falls within the range of discretion accorded the non-judicial branches of government.

More important, it would be both inaccurate and misleading to view petitioner's admissions program as intended to discriminate against non-minority persons on the basis of their race. While an unavoidable consequence of the program is to deprive persons, such as respondent Bakke, of admission to the Davis medical school, awareness of such consequences is not the equivalent of discriminatory intent against non-minority applicants. Such consequences furnish no basis for invalidating an otherwise legitimate program, particularly in light of such recent decisions as Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corporation, 45 U.S.L.W. 4073 (1977) and United Jewish Organizations of Williamsburgh, Inc. v. Carey, 45 U.S.L.W. 4221 (1977).

ARGUMENT

We join with petitioner in urging that the decision below be reversed. We do not propose, however, to attempt to persuade the Court of the wisdom of Davis' minority admissions program or such programs generally. There are numerous sound arguments on both sides of that issue; they have been fully explored in the literature 1/ and will doubtless be ably

---

1/ See, e.g, Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723 (1974); Karst & Horowitz, Affirmative Action and Equal Protection, 60 Va. L. Rev. 975 (1974); Nagel, Equal Treatment and Compensatory Discrimination, 2 Phil. & Pub. Affs. 348 (1973); O'Neil, Racial Preference and Higher Education: The Larger Context, 60 Va. L. Rev. 925 (1974); Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1; Redisch, Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments, 22 U.C.L.A. L. Rev. 343 (1974); Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi L. Rev. 653 (1975); Developments in the Law -- Equal Protection, 82 Harv. L. Rev. 1065, 1104-27, 1166-69 (1969).

briefed in this Court. Instead, we wish to share with the Court our thoughts concerning the perspective from which we believe the Court should approach this case. That perspective, simply stated, is that the equal protection clause does not empower the judiciary to withdraw from other branches of government the decision whether to implement a reasonably drawn affirmative action admissions program at this juncture in our history. Stated otherwise, we submit that the principal issue in this case is not the wisdom or desirability of the Davis program, but merely its permissibility as an act of legislative or executive competence. As observed by Professor Paul Brest: "It is a truism -- only because it is true -- that a practice may be unwise or even unfair and yet not be unconstitutional." Brest, Foreword: In Defense of the Anti-Discrimination Principle, 90 Harv. L. Rev. 1, 54 (1976).

We submit, further, that the decision below is wrong not as a matter of social policy but as an unwarranted extension of judicial power at the expense of such important constitutional values as the separation of governmental powers. While the courts have played an unquestioned role in the civil rights efforts of the past two decades, we believe that the decisions which inform this Court's judgment on the issues presented here are not principally those dealing with race relations but those which, over the

past two centuries, have defined and delimited the role of the courts in declaring the acts of another branch of government to be not merely unwise, but unconstitutional.

I. The Judiciary and the Equal Protection Clause: A General Perspective

Notwithstanding the equal protection clause and the fact that "discrimination" has assumed a pejorative connotation in the minds of many, discrimination (i.e., treating people differently) is a principal means by which government carries out its business. See, e.g., Tussman and ten Broek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 343-44 (1949). Government sorts us, for example, into those who do and do not go to jail 2/ and those who do and do not go to war 3/ -- clearly discriminations which touch vital interests. Government also sorts us with respect to less vital matters: it divides us into those who pay income taxes at one rather than another rate and those who pay no income taxes at all; it also sorts us into those who are allowed to drive all varieties of vehicles, those

---

2/ E.g., Tigner v. Texas, 310 U.S. 141 (1940).

3/ E.g., Simmons v. United States, 406 F.2d 456 (5th Cir. 1969), cert. denied 395 U.S. 982 (1970).

permitted to drive only cars and those prohibited from driving altogether. The overwhelming majority of these discriminatory governmental actions withstand challenge or go unchallenged because they are recognized to be useful and often necessary means to pursue acceptable governmental purposes.

As the principal architects of our laws, it is the non-judicial branches which select the goals to which government devotes its resources. These branches establish priorities between those goals, identify the many instances in which discriminatory treatment is a necessary or proper means to achieve the goals and in such instances select the basis for discrimination. Founded principally on the equal protection clause, the judiciary's role in evaluating challenges to discriminatory governmental action is properly a limited one.4/ Its task is to void only those few discriminatory governmental actions which are constitutionally "intolerable." Curtis, A Modern Supreme Court in a Modern World, 4 Vand. L. Rev. 427, 433

4/ E.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 31-33 (1973); Jefferson v. Hackney, 406 U.S. 535, 548 (1972); see also Craig v. Boren, 45 U.S.L.W. 4057, 4064-65 (1976) (dissenting opinions of Chief Justice Burger and Justice Rehnquist).

(1951) (". . . to call a statute constitutional is no more of a compliment than it is to say that it is not intolerable"). These include discriminatory laws which are intended to achieve goals believed to be unacceptable for governmental action (e.g., Shapiro v. Thompson, 394 U.S. 618, 629 (1969) ("the purpose of inhibiting migration by needy persons into the State is constitutionally intolerable")), and discriminatory laws which, although directed toward a proper public purpose, are thought to promote that purpose in an inefficacious or oppressive manner (id. at 634-38; Reed v. Reed, 404 U.S. 71 (1971)).

II. Race and the Equal Protection Clause

It is within the framework described above that the judiciary has struck down discriminatory state action employing race as a sorting criterion. These decisions find their basis in the history of the country and the fourteenth amendment. The voided governmental action in these cases -- for example, "Jim Crow" laws -- typically involved a manifestation of hostility towards racial minorities. See, e.g., Nixon v. Herndon, 273 U.S. 536 (1927); Strauder v. West Virginia, 100 U.S. 303 (1880); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Such action was intended to oppress members of a particular race and perpetuate racism, clearly unacceptable goals for governmental action. The defect in these laws was not that their impact was racially skewed --

certainly much governmental action can be so described -- but that they were intended, and were perceived as intended, to oppress a particular racial group.

These judicial decisions have caused some courts and commentators to fall into the habit of thinking in terms of overbroad slogans -- for example, "the Constitution is color blind" -- and believing that, except perhaps in remedial situations involving prior de jure discrimination, the proper judicial role is to ensure that race never plays a part in governmental decision-making. This approach ignores both the history of the fourteen amendment and the limits of the judicial function.

Beyond doubt, the authors of the equal protection clause did not intend to prohibit state action which employed racial criteria for the purpose of reducing the past effects of public and private discrimination against minorities. See, e.g., Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653, 664 (1975). This conclusion is conceded even by opponents of affirmative action admissions programs. See, e.g., Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1, 21-22, n.2. Indeed, the architects of the equal protection clause did not even contemplate that their creation would

proscribe all varieties of governmental discrimination against blacks. See Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 58 (1955). And although this Court need not tie its interpretation of the equal protection clause to the immediate concerns of its authors, it at the same time should not be governed by a palpably erroneous view of history. See, e.g., Sandalow, supra, at 666 ("[O]nly a misconception of the past leads to the conclusion that [the equal protection clause] imposes upon government an obligation of 'color blindness'.").

Wisely, this Court has recognized that to adopt the procrustean rule that the non-judicial branches can never include race-based discrimination in the arsenal of weapons they deploy to attack social problems would transgress its limited constitutional role. Thus, the Court noted in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971), that school authorities have "broad discretionary powers", even absent prior de jure discrimination, to command that schools have specified ratios of black and white students "in order to prepare students to live in a pluralistic society." Similarly, in United Jewish Organizations of Williamsburgh, Inc. v. Carey, supra, the Court rejected a challenge to the reapportionment of state legislative districts effected solely for the purpose of achieving non-white majorities in some districts. The Court stated

that nothing in the fourteenth amendment "mandates any per se rule against using racial factors in districting and apportionment."5/ (45 U.S.L.W. at 4226.)

5/ To be sure, there are numerous equal protection cases in this Court and elsewhere which refer to race as a particularly suspect basis of classification. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964) and Bolling v. Sharpe, 347 U.S. 497 (1954). The issue, however, is not the correctness of such decisions but whether their reference to race as a suspect classifying factor is the product of principled analysis or, instead, mere legal shorthand for the kinds of disadvantaged groups -- identified in footnote 4 to Carolene Products (304 U.S. 144, 153 (1938)) and described with further particularity in Justice Powell's opinion in San Antonio Independent School District v. Rodriquez, supra -- which are especially vulnerable to opprobrious treatment. We submit that analysis of the cases clearly suggests the latter, a conclusion also supported by the analysis in text. See pp. 15-19, infra;

These authorities establish that, under proper circumstances, courts should defer to actions initiated by the non-judicial branches which are intended to effect solutions to the country's racial problems. Although we recognize that government cannot be compelled to institute remedial action where prior de jure discrimination cannot be shown, we take sharp issue with the view that the non-judicial branches are not allowed to institute such actions without such a showing. See Executive Order 11246, 30 Fed. Reg. 12319, as amended, 32 Fed. Reg. 14303 & 34 Fed. Reg. 12985 (mandating affirmative action by federal contractors without a prior finding of discrimination). Government is not in the business simply of remedying its past wrongs; its business is the pursuit of those goals which the citizenry, through its elected officials and their delegees, deem worthy of pursuing by governmental means. Moreover, it certainly cannot matter to Allan Bakke whether he is denied admission to the Davis medical school because that school did or did not

---

[footnote cont.]

Developments in the Law -- Equal Protection, supra, note 1, at 1104-13, 1125-27; Brest, Foreword: In Defense of the Antidiscrimination Principle, supra, at 15-17.

discriminate against minorities in the past. And it is Bakke's rights, after all, which the medical school allegedly violated. 6/

III. Affirmative Action Admissions Programs

The points developed above lead to what we perceive as the principal question in this case: are affirmative action admissions programs, such as that employed by Davis, among

---

6/ We submit, further, that cases such as United Jewish Organizations are not distinguishable from the present controversy on the ground that plaintiffs in the former case were not denied a benefit (voting), whereas Allan Bakke was denied a benefit (admission to the Davis medical school and the medical profession). To accept this distinction is to make the mistake of assuming that the unsuccessful plaintiffs in United Jewish Organizations viewed voting as an end rather than a means. Their concern, of course, was to elect legislators sympathetic to their views and needs. Since there are only a fixed number of legislators in the bodies to which New York voters elect members, any voting leverage bestowed on the minorities favored by the challenged redistricting deprived the plaintiffs of that same amount of leverage.

those constitutionally tolerable, non-judicial governmental actions which employ racial criteria as a means to pursue proper public purposes? As in the case of other equal protection adjudication, this question must be answered by examining both the goals of such programs and the means chosen to achieve those goals. Confident that the briefs of petitioner and other amici will explore these matters extensively and well, we confine our remarks to several points which we believe are particularly important to the analysis of this issue.

A. Goals

Although articulable in a variety of ways, the problems sought to be alleviated by affirmative action admissions programs involve demonstrably important governmental issues. Certainly this Court has taken notice of, and we hardly need elaborate, the critical nature of the country's racial problems.

Further, the problems sought to be alleviated have proven themselves stubbornly resistant to solution. This dictates that the judiciary afford the other branches of government considerable leeway in which to search for remedies. This Court has repeatedly endorsed this approach in a number of cases involving economic regulation intended to address seemingly less compelling public goals. See, e.g., Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

This case is not like the typical equal protection controversy in which the challenged action is intended to solve a relatively focused public problem amenable to solution by means of one or few techniques. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (rejecting durational residency requirements for voting as a means to control voter fraud because one or two other techniques available). Vastly different in character, the country's racial problems are multi-dimensional; they affect numerous institutions and assume varieties of tangible and intangible forms. Under these circumstances, judicial insistence that the other branches select one or a few remedial devices or seek the "least restrictive alternative" could very well strangle the effort to alleviate those problems. The non-judicial branches must be permitted, should they choose, to use a vast array of techniques in an effort to bring about the breakdown of the many complex conditions constituting and contributing to the country's racial difficulties and tensions. See Developments in the Law -- Equal Protection, supra, note 1, at 1106-07.

Finally, we believe that the critical element which is common to those cases in which this Court has struck down "racial classifications" is not the mere utilization of race as a sorting criterion nor the fact that the challenged classification may have had a racially biased effect. Rather, we suggest that the common and critical element in these cases is an

intent to act in a racially hostile manner, i.e., with the purpose of disadvantaging a particular racial group, be it black, white or other. This is not only consistent with the Court's equal protection cases generally, but is particularly supported by such recent cases as Arlington Heights, Washington v. Davis and United Jewish Organizations.

Thus viewed, petitioner's admissions program is not constitutionally impermissible. To be sure, petitioner in some fashion intended that its affirmative action program would exclude white applicants, i.e., it was aware that its program would have that effect.7/ Such conse-

---

7/ This characterization comports with the common law tort concept that one "intends" the consequences likely to follow from his deliberate conduct. Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955). Clearly, however, the same can be said for the governmental actions which withstood constitutional challenge in the cases cited in text. In Arlington Heights, for example, the Village of Arlington Heights intended to exclude blacks in the sense that it knew its zoning scheme would have that effect. This Court clearly has rejected, therefore, the tort concept of intent for use in equal protection adjudication. Indeed, if the test of legality were simply the racial effect of Davis'

quences are not, however, the equivalent, for equal protection analysis, of programs having a hostile racial objective.

We submit that the line drawn by the cases cited above is between hostile racial purpose and unfortunate, albeit anticipated and unavoidable, racially skewed effects.8/ This

---

[footnote cont.]

admissions policies, a program based solely on test scores -- one which the present record suggests would have left the Davis student body virtually entirely white -- would be vulnerable to constitutional attack by Allan Bakke's black counterpart.

8/ The source of petitioner's difficulty and, thus, of the present legal controversy, is that admission to the Davis medical school involves what social scientists have referred to as a "zero sum" situation (see Von Neumann & Morgenstern, Theory of Games and Economic Behavior (Princeton, 1953)); that is, for Davis to make room for 16 minority students it must necessarily take away a like number of places from persons who would otherwise qualify for admission. This phenomenon -- though often more attenuated -- is frequently encountered in governmental decision-making, which nearly always involves allocation between

Court has properly recognized that only the former imposes the kind of burdens and oppression which justify judicial intervention into the business of government's other branches. Stated otherwise, the difference is between the intended "racial slur[s] and stigma" to which Justice White referred in his plurality opinion in United Jewish Organizations 9/ and the "awareness" of racial effects which Justice Stewart found distinguishable in his concurrence. Id. at 4321 ("awareness [of racial consequences] is not . . . the equivalent of discriminatory intent").

[footnote cont.]

of a scarce resource pool among competing interests and programs. While this fact may be apparent -- indeed, it is virtually tautological -- it illustrates the point that Davis' exclusion of respondent Bakke and others is merely an unavoidable effect of its program, and does not reflect any desire to disadvantage or otherwise prejudice non-minority applicants.

9/ "There is no doubt that . . . the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment . . .." 45 U.S.L.W. at 4227.

These cases are not, we submit, distinguishable from the present controversy on the ground that petitioner, but not, for example, the Village of Arlington Heights, employed explicitly racial criteria as the means to pursue its goal. As discussed in the next section of this brief, an effective and ingenuous program intended to ameliorate race problems must, of necessity, take racial considerations into account. Thus, the suggestion made in the majority opinion below that petitioner should have attempted to achieve its objectives through less overtly racial means can only be viewed as a suggestion to the executive and judicial branches to, in effect, "hide the ball". See Bakke v. Regents of the University of California, 18 Cal.3d 34, 55 (1976). But such indirection should no more be required to preserve the legality of Davis' program than were efforts to mask racial animus through seemingly non-racial programs adequate to rescue those schemes which were in fact so motivated. E.g., Griffin v. County School Board, 377 U.S. 218 (1964); Terry v. Adams, 345 U.S. 461 (1935); Lane v. Wilson, 307 U.S. 268, 275 (1939)("the [Constitution] nullifies sophisticated as well as simple-minded modes of discrimination").

B. Means

Those who would replace the Davis affirmative action program with one intended to increase the number of economically or educationally "disadvantaged" applicants admitted to the

medical school miss a critical point: although the problems sought to be alleviated by the Davis program are not unrelated to such disadvantage, the heart of those problems relates to the continuing social impact of race, not economic or educational disadvantage. To admit a disadvantaged white to medical school is therefore not to promote the intended goal -- the alleviation of racial problems. However, to admit a black, whether disadvantaged or not, does further the intended purpose. It serves, for example, to furnish black professional role models for black youth and to diminish stereotypic perceptions of blacks held by white members of the medical school's student body. 10/

Those who are offended because Davis does not select its medical students solely on the basis of grades, test scores and other

---

10/ Reasonable minds may, of course, differ as to the wisdom or efficacy of such methods. Again, however, the issue before this Court is not wisdom, but constitutionality. See Brest, supra, at 53-54. Under these circumstances, we submit that it would be constitutionally inappropriate for the Court to substitute its judgment for that of the university officials charged with responsibility for establishing educational policy under California law.

allegedly "objective" indicia of ultimate professional skill lose sight of the fact that their concerns relate to policy and are properly addressed to the non-judicial branches; the Constitution does not compel Davis to employ such admissions criteria. 11/ More important, any claim that Davis should admit only the most competent among those who seek to attend its medical school begs a critical question. As Professor Sandalow points out: "Competence is the ability to perform a task in line with certain objectives" (Sandalow, supra, note 1, at 674). Preparation of technically proficient doctors is only one of several public objectives Davis has chosen to pursue. It has resolved, for example, to seek a geographically diverse student body (Bakke, supra, at 42) and for this reason presumably rejects applicants from Los Angeles in favor of applicants from Susanville, California because the latter, but not the former, may be competent to help it achieve that diversity.

So, too, Davis has sought to integrate the profession racially and to contribute to the solution of California and the country's racial

---

11/ In fact, Davis apparently took care to select, through its special admissions program, only applicants whom its professional faculty was convinced had the ability to become qualified doctors. Bakke, supra, at 88-89.

problems. 12/ When matched against this objective, black Davis applicants are

---

12/ That a medical school rather than, for example, a civil rights agency seeks to pursue such ends should not affect the outcome of this case. A frequent criticism of specialization by public agencies is that each agency often focuses only on its narrow reason for being, taking action which fails to account for other public concerns. Thus, for example, the National Environmental Protection Act, 42 U.S.C. § 4321 et seq., mandates that all federal agencies consider the environmental impact of their decisions. See 42 U.S.C. § 4332.

More fundamentally, the allocation of decision-making power among the various agencies of California government is a matter of state law, not federal constitutional law. See, e.g., Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 26 (1959); see also Uphaus v. Wyman, 360 U.S. 72, 77 (1959); Minersville School Dist. v. Gobitis, 310 U.S. 586, 597 (1940). We believe, therefore, that the Court must treat the Davis program as though it were expressly adopted by the California legislature, particularly since the California Constitution accords the Regents and their

psuperbly competent and white Davis applicants are entirely incompetent.

This analysis is not semantic legerdemain. It explains why a

[footnote cont.]

> delegees a status very nearly equivalent to a fourth, co-equal branch of California government. See Cal. Const., Art. IX, § 9; Ishimatsu v. Regents of the University of California, 72 Cal. Rptr. 756 (1968); Wall v. Board of Regents, 102 P.2d 533 (1940). Respondent has not, in any event, claimed that the Davis program is ulta vires the medical school's state law authority.
>
> It should not be forgotten, finally, that Californians, the majority of whom are not members of those groups favored by the Davis program, remain free to modify or discontinue the program either directly or through their elected representatives. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 727, 731-32 (1974). A measure which, among other things, would have precluded the use of race as an admissions criterion by the University of California was on the ballot in California as a proposed state constitutional amendment in November 1976, but failed to gain voter approval.

preference for minority applicants rests on the same premise as a preference for intellectually superior applicants -- the belief that admission of those chosen for the entering medical school class is more likely to achieve certain public goals than admission of those excluded from the class. It also demonstrates why the means chosen are precisely tied to the ends desired. Rather than being a "less restrictive alternative," a special admissions program focusing on "disadvantage" regardless of race is both overinclusive and underinclusive relative to the objective: alleviation of racial problems. 13/

C. Allan Bakke

In reaching its decision in United Jewish Organizations, the Court relied in part on the fact that the

---

13/ Suggestions, as in the majority opinion below, that petitioner should have sought to achieve its goal of greater minority representation through less direct means similarly misses the point. Assume that instead of adopting a minority admissions program, Davis set out to achieve its objective by means of a program of special minority recruitment, tutoring and financial aid. Such a program would presumably satisfy the majority's concerns (Bakke, supra, at 55), even if its result were to increase the number of minority students in the entering Davis class from zero to 16,

reapportionment there involved left white majorities in 70% of New York's assembly and senate districts, a figure closely in line with the percentage of whites in the affected population as a whole. The Davis program did not even go that far; white representation in the medical school's student body materially exceeded the representation of whites in California's population as a whole. Bakke, supra, at 88 and note 16.

It nevertheless remains to be said that Allan Bakke is not in that student body and that he has suffered a very real detriment. We do not mean to belittle that detriment, nor do we suggest that the detriment to Bakke is lessened by the fact that Davis accepted other white applicants. Yet however great his disappointment, it is a disappointment shared by the many other capable persons who sought

---

[footnote cont.]

and even if respondent Bakke were one of the displaced white applicants. But if that be the case, why condemn a program which achieves the same end only in a more direct and efficient manner? After all, the goal of remedial racial programs is that they should "work, and . . . work now." Green v. County School Board, 391 U.S. 430, 439 (1968)(emphasis in original).

admission to the school and were rejected because California government struck the balance in favor of a policy objective inconsistent with their admission. Some of those rejected can trace their disappointment to the fact that the California state assembly chose to apply public funds to purposes other than medical school expansion. Others owe their misfortune to the fact that the medical school seeks geographic heterogeneity. And so, too, Allan Bakke, whose frustration stems from Davis' good faith attempt to strike at one of the country's most tragic and enduring social problems. 14/

14/ We also question respondent Bakke's standing as a person injured by Davis' assertedly unconstitutional program. To qualify for the program, an applicant had to be both a member of a minority group and economically or educationally disadvantaged. Bakke, supra, at 40-43. However, the asserted unconstitutionality of the Davis program is not its existence as such, but its use of race as a qualifying criterion for admission under that program. Yet the record is devoid of any evidence that Bakke would have qualified for special admission as a disadvanged applicant even if race had not been used as a criterion. Stated otherwise, we submit that the persons with standing to challenge Davis' program are not those who would have been admitted in the absence of any special admissions program, but those who would have been admitted under a program which did not take race into account, i.e., disadvantaged whites.

Without doubt, an affirmative action admissions program -- for example, one which entirely excludes non-minority applicants or admits persons wholly incapable of performing competently -- may transcend the bounds of constitutional tolerance. But by way of analogy, although Chief Justice Marshall was correct that "the power to tax involves the power to destroy" (McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 429 (1819)), Justice Holmes' admonition "not . . . while this court sits" (Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 223 (1928)) reveals the essence of the important but limited judicial role. That the precise boundaries of permissible affirmative action admissions programs may be difficult to draw certainly fails to distinguish such programs from the many other continua which the judiciary is frequently called upon to divide.

This Court has repeatedly recognized that the proper locus for judgments of policy is the non-judicial branches, the branches most directly and effectively controlled by the people affected by those judgments. We submit that the Court should not withdraw from these arenas the critical policy judgment whether to adopt an affirmative action admissions program. The more limited judicial role suggested here fully protects constitutional values.

CONCLUSION

For the reasons stated, the decision of the Supreme Court of California should be reversed.

Dated: June 4, 1977.

Respectfully submitted,

STEPHEN V. BOMSE
DANIEL E. TITELBAUM

Attorneys for Amici

THOMAS J. BREWER
HENRY L. HECHT
HELLER, EHRMAN, WHITE & McAULIFFE

Of Counsel